

## THE UK'S NATIONAL SECURITY AND INVESTMENT REGIME – LATEST MARKET GUIDANCE

The Department for Business, Energy & Industrial Strategy ("BEIS") has published a suite of new market guidance as well as an Annual Report, providing increased clarity on the UK's national security and investment regime and insights into how it is working in practice.

### THE NATIONAL SECURITY AND INVESTMENT REGIME

A new UK national security screening regime came into effect on 4 January 2022 through the National Security and Investment Act 2021 ("NSI Act") which gives the UK Government the power to assess certain transactions for national security risks. The rules apply if there is a "change of control" in relation to a wide range of entities or assets and impose mandatory filing obligations for certain investments in entities with specified activities in sensitive sectors - see our [January 2022 briefing](#) for further details.

### NEW MARKET GUIDANCE NOTES PUBLISHED BY BEIS

On 19 July 2022, BEIS published a set of [market guidance notes](#) which provide guidance on the interpretation of the NSI Act, including whether certain types of events constitute acquisitions of control of an entity for the purposes of the NSI Act as set out below.

#### **Providing clarity on the circumstances in which the acquisition of contractual voting rights may constitute an acquisition of control over an entity**

With respect to the acquisition of voting rights that enable a person to secure or prevent the passage of any class of resolution governing the affairs of the target entity, BEIS has confirmed that:

- this change of control test is primarily aimed at entities that set alternative voting thresholds for passing or blocking resolutions (or equivalent);
- it considers that contractual rights are not covered by the NSI Act under the "acquisition of voting rights" on the basis that such contractual rights are not themselves voting rights, provided such contractual rights do not amount to control of such voting rights (e.g. through an arrangement between the shareholder and a third party that voting rights are only exercisable in accordance with the instructions or direction of the third party) – this is helpful confirmation that rights contained in a shareholders' agreement taken by minority investors are unlikely to satisfy this criteria; and

#### 17 sensitive sectors

- Advanced Materials
- Advanced Robotics
- Artificial Intelligence
- Civil Nuclear
- Communications
- Computing Hardware
- Critical Suppliers to Government
- Cryptographic Authentication
- Data Infrastructure
- Defence
- Energy
- Military and Dual-Use
- Quantum Technologies
- Satellite and Space Technology
- Suppliers to the Emergency Services
- Synthetic Biology
- Transport

*Only certain activities within these sectors are specified as sensitive. For assistance in verifying whether your business may be engaged in specified activities, speak to your usual Clifford Chance contact.*

- if control over voting rights is acquired contractually, such contractual rights would need to enable the acquirer to secure or prevent the passage of all resolutions of a particular class to be relevant for the purposes of this test.

Notwithstanding the above, the Government recognises that the breadth of matters which might be subject to investor consent is extensive and is also mindful of those seeking to exert malign influence over sensitive businesses through the use of contractual rights. It may be, depending on the facts of the case, that contractual rights – either alone or together with other interests or rights – give an acquirer the ability to materially influence the policy of the target.

An acquisition of material influence is not subject to mandatory notification. However, the parties may submit a voluntary notification. Whether a notification is submitted or not, the Secretary of State may call in qualifying acquisitions where they reasonably suspect the acquisition may give rise to a risk to national security.

**Explaining that internal reorganisations may constitute qualifying acquisitions (requiring mandatory notification) where they result in an acquisition of control over a qualifying entity even if the ultimate beneficial owner of the entity remains the same**

BEIS explains that there may be rare cases where the acquisition of control over an entity by a person in the same business group raises national security risks even if the ultimate beneficial owner is the same before and after the qualifying acquisition.

This is because an acquisition of control by another "link" in the corporate structure – particularly one where the ultimate beneficial owner is passive – could enable a hostile actor to pursue malign actions over the entity.

**Confirming that the *granting of security over shares in a qualifying entity will not be a notifiable acquisition requiring mandatory notification which does not transfer legal title to the shares or confer voting rights in the shares to the security holder until an event occurs (such as a default under a loan agreement)*<sup>1</sup>**

If legal title to the shares is transferred (e.g. to a third party purchaser as part of the enforcement of the share security) or control (as defined by the NSI Act) passes in some other way (e.g. through the acquisition of voting rights by the security holder on the occurrence of a default or enforcement event) a prior notification and clearance will be required if the shares relate to an entity subject to the mandatory notification regime.

**Setting out when the Government may publish information about individual acquisitions**

There are no statutory requirements under the NSI Act for the Government to publish information about individual acquisitions prior to a final order being made. The Government is, however, required to publish notice of the fact that a final order has been made.

Consistent with its practice, BEIS confirms that it will not publish information regarding the receipt (or not) and the acceptance or rejection of individual notifications. However, it may choose to publish information regarding call-in notices or final notifications (clearances) – in particular in cases where the

**Notifications**

- The guidance also provides advice on completing notifications.
- This includes the importance of structure charts to include the ultimate beneficial ownership of both the qualifying entity and the acquirer, the nationalities (for named individuals), the country of incorporation (for entities), any subsidiaries and the percentages of ownership between entities.
- A single notification can be made for multiple acquisitions in certain circumstances, for example where a qualifying acquisition involves multiple qualifying entities or assets being acquired by a single acquirer from a single seller.
- The guidance emphasises that filling in the notification form correctly will help to ensure that acquisitions can be assessed without delay.

**Temporary acquisitions of control**

- The guidance confirms that the appointment of liquidators and receivers may constitute a qualifying acquisition under the NSI Act and, in some specific scenarios, may require mandatory notification.
- The NSI Act does not treat rights that are exercisable by an administrator or by creditors while an entity is in relevant insolvency proceedings as being held by the administrator or creditors.

<sup>1</sup>However the creation of a share pledge over shares in a qualifying entity of a specified description under Scots law, where title to the shares is transferred to the secured lender or its nominee, would require prior notification and clearance from the Government.

parties disclose such information, or the acquisition is otherwise in the public domain and the Secretary of State considers it is in the public interest to do so. To date, the Government has made public only two called in transactions: the acquisition by Altice of 6% of shares in BT and the acquisition by Nexperia of Newport Wafer Fab.

For acquisitions which are called in and subject to an interim order, the Government will not publish information about the specific contents of any such order, but may choose to state that one has been made.

Where the Government chooses to make a proactive announcement it will ordinarily seek to provide advance notices to the parties and to make it when the relevant markets are closed.

## **NEW BEIS GUIDANCE ON THE APPLICABILITY OF THE NATIONAL SECURITY AND INVESTMENT REGIME TO NEW BUILD DOWNSTREAM GAS AND ELECTRICITY ASSETS**

On 20 July 2022, BEIS published [guidance](#) to assist developers of new build downstream gas and electricity infrastructure in understanding the scope of the national security and investment regime<sup>2</sup>.

### **What does the Government consider to be qualifying assets in downstream gas and electricity infrastructure?**

BEIS has confirmed that qualifying assets in the downstream gas and electricity sectors include (but are not limited to) new transmission infrastructure, new electricity generation infrastructure, new distribution infrastructure, new gas processing infrastructure, new gas import or export facilities and new energy storage infrastructure.

### **When could a purchaser acquire a right to such an asset?**

BEIS has confirmed that in the context of new build downstream gas and electricity infrastructure, a person acquires a right in such an asset when it acquires the right to operate the asset and/or connect it to the network. The right to operate the asset could be acquired through (but is not limited to) the grant of an operating licence, a licence modification, an operating contract or network connection agreement.

### **Is the acquisition of such assets subject to mandatory notification?**

The acquisition of assets is *not* subject to mandatory notification but the Government can call in a qualifying asset acquisition for assessment if it reasonably suspects that the acquisition has given rise to, or may give rise to, a risk to national security – for example, once the asset is built and operational.

This applies whether the acquisition has been completed or is still in progress or contemplation (although it is not possible to call in and assess acquisitions completed before 12 November 2020).

In practice, this means that call-in or notification can occur on application for a right to operate the asset even where the asset has not yet been constructed.

---

<sup>2</sup> The guidance does not cover the acquisition of entities, or the acquisition of existing assets.

### When can voluntary notifications be made?

A voluntary notification can be submitted if a person is planning a qualifying acquisition that is not covered by mandatory notification and wants to find out if the Government is going to call it in.

### WHAT DEALS HAS THE SECRETARY OF STATE BLOCKED AND WHAT TYPE OF CONDITIONS HAVE SO FAR BEEN IMPOSED ON DEALS PROCEEDING?

BEIS recently published its first Annual Report on the new regime, which covers the period from 4 January 2022 (when the regime came into effect) to 31 March 2022. Despite only covering a short period, the report contains a number of helpful insights on how the regime is operating in practice some of which are set out in the blue box opposite.

No transactions had been blocked or subjected to conditions during the initial three months (perhaps unsurprisingly given the timing). However, in July 2022, two deals have failed to secure unconditional approval from the Secretary of State.

On 14 July 2022, the Government imposed conditions on the acquisition of Sepura Ltd by Epiris LLP, Epiris GP and Sword Bidco Ltd. Sepura (and its former parent) were already subject to undertakings arising from a previous transaction, and the Secretary of State's notice of final order confirms that the main undertakings would be carried forward to this acquisition. In particular, the Secretary of State imposed requirements to protect sensitive information and technology and to maintain Sepura's relevant capabilities in the UK. This confirms that undertakings required under the previous public interest intervention regime provide useful guidance for the types of conditions which could be imposed under the NSI Act.

On 20 July 2022, the Government blocked the acquisition of intellectual property by Beijing Infinite Vision Technology Company Ltd under a licence agreement with the University of Manchester relating to certain vision sensing technology (which has dual-use applications) to develop, test and verify, manufacture, use, and sell licenced products. Interestingly, the deal was not subject to a mandatory notification but the Government considered that the grant of an intellectual property licence constitutes a trigger event under the voluntary regime.

### NEXT STEPS: POTENTIAL FOR A WHITELIST OF INVESTORS?

Although the NSI Act gives the Government the power to create exemptions from mandatory notification based on the acquirer's "characteristics", there is currently no such whitelist of investors. However, the guidance confirms that the Government is monitoring closely the trends and risks of the regime to determine whether it would be appropriate to make exemptions to the mandatory notification requirements.

#### Statistics from the Government's first Annual Report on the NSI Act regime

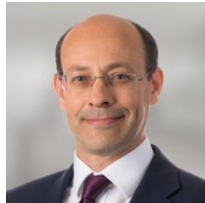
- Covers the period from 4 January 2022 (when the regime came into effect) to 31 March 2022.
- 222 notifications (196 mandatory, 25 voluntary and 1 retrospective) were submitted in the first 3 months of the regime (lower than Government predictions of ~250-458 per quarter).
- The total number of accepted voluntary notifications (22) is significantly lower than Government predictions for voluntary notifications arising from asset sales (~72-215 per quarter).
- This would suggest that parties are not routinely submitting precautionary filings.
- The Secretary of State had called in 17 transactions (13 under the mandatory regime and 4 under the voluntary regime) for a more detailed assessment which is at the lower end of Government predictions (~17-24 per quarter).
- The five most common mandatory notification sectors (Defence, Military and Dual Use, Critical Suppliers to Government, Artificial Intelligence, and Data Infrastructure) also received the largest number of call-in notices.

## CONTACTS



**Aniko Adam**  
Senior Associate

**T** +44 20 7006 2201  
**E** aniko.adam  
@cliffordchance.com



**Charles Cochrane**  
Partner

**T** +44 20 7006 2196  
**E** charles.cochrane  
@cliffordchance.com



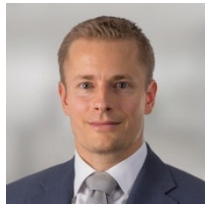
**Katherine Ellis**  
Senior Associate  
Knowledge Lawyer

**T** +44 20 7006 4321  
**E** katherine.ellis  
@cliffordchance.com



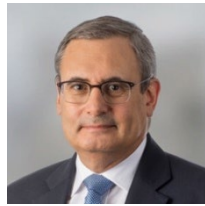
**Sue Hinchliffe**  
Partner

**T** +44 20 7006 1378  
**E** sue.hinchliffe  
@cliffordchance.com



**Nelson Jung**  
Partner

**T** +44 20 7006 6675  
**E** nelson.jung  
@cliffordchance.com



**Alex Nourry**  
Partner

**T** +44 20 7006 8001  
**E** alex.nourry  
@cliffordchance.com



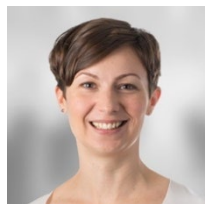
**Greg Olsen**  
Partner & Head of  
London Antitrust  
Practice

**T** +44 20 7006 2327  
**E** greg.olsen  
@cliffordchance.com



**James Pay**  
Partner

**T** +44 20 7006 2625  
**E** james.pay  
@cliffordchance.com



**Jennifer Storey**  
Partner

**T** +44 20 7006 8482  
**E** jennifer.storey  
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

[www.cliffordchance.com](http://www.cliffordchance.com)

Clifford Chance, 10 Upper Bank Street,  
London, E14 5JJ

© Clifford Chance 2022

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571

Registered office: 10 Upper Bank Street,  
London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to [nomorecontact@cliffordchance.com](mailto:nomorecontact@cliffordchance.com) or by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ

Abu Dhabi • Amsterdam • Barcelona • Beijing • Brussels • Bucharest • Casablanca • Delhi • Dubai • Düsseldorf • Frankfurt • Hong Kong • Istanbul • London • Luxembourg • Madrid • Milan • Munich • Newcastle • New York • Paris • Perth • Prague • Rome • São Paulo • Shanghai • Singapore • Sydney • Tokyo • Warsaw • Washington, D.C.

Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.